

THE QUEEN v TAUFHEMA (S142/2006)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 8 May 2006

Date of referral to the Full Court: 29 September 2006

On 27 March 2002 two off-duty police officers reported seeing a car being driven in an erratic and a potentially dangerous fashion. Constable McEnallay responded to that call and he began a pursuit. In that car were the Respondent, three passengers and four loaded firearms. In the course of that pursuit, the Respondent's car collided with a gutter and was immobilised. One of the occupants got out and fatally shot Constable McEnallay. All four men then fled, with each of them carrying a firearm. The Respondent was later charged with Constable McEnallay's murder without ever having fired a shot. He was also charged with the illegal possession of a firearm.

The central issue at trial was whether the Respondent was party to a joint criminal enterprise. Justice Sully instructed the jury that it must be satisfied that all four men had agreed to jointly evade lawful apprehension before it could convict the Respondent for murder. It also had to be satisfied that the Respondent knew of at least one loaded gun in the car and had considered the possibility that someone may use it. This is in circumstances whereby there was a real risk that Constable McEnallay might be killed or seriously injured. The Respondent said however that he had no knowledge of the firearms prior to the firing of the fatal shots. The Respondent was found guilty of murder and of possession of a firearm. Justice Sully then sentenced him to 23 years imprisonment, with an effective non-parole period of 16 years. As for the others, Mr Penisini (the shooter) pleaded guilty to murder. The Respondent's brother, Mr John Taufahema, was tried separately and was also convicted of murder. Mr Meli Lagi was acquitted of murder but found guilty of using a firearm to evade apprehension.

On 8 May 2006 the Court of Criminal Appeal (Beazley JA, Adams & Howie JJ) unanimously held that Justice Sully had misdirected the jury on the elements of joint criminal enterprise with respect to murder. He had also failed to leave manslaughter open as an alternative. Their Honours found that Justice Sully had wrongly directed the jury that the joint criminal enterprise was "evading lawful apprehension". This was held to be an error for two reasons. Firstly, there was no offence of "evading lawful apprehension". Secondly, there was also no evidence that the Respondent had agreed with the others to jointly evade apprehension. This is distinct from the Respondent individually deciding to avoid apprehension, knowing that his co-offenders would do likewise. The Court of Criminal Appeal therefore held that there was no evidence of a joint foundational offence arising out of the attempt to evade Constable McEnallay. The Respondent could not therefore be convicted of either murder or manslaughter. A verdict for acquittal was then entered.

On 29 September 2006 Chief Justice Gleeson and Justice Heydon adjourned this application for special leave to appeal to a Full Court.

The questions of law said to justify the grant of special leave to appeal are:

- Whether the liability of a secondary party for a contingency arising in the context of a joint criminal enterprise depends on the scope of the joint criminal enterprise and whether the contingency was contemplated as a possible incident of the enterprise, or whether liability is determined separately by identifying a discrete foundational offence which the parties agreed to commit or contemplated might be committed in respect of that contingency.
- Whether the determination of the scope of the relevant joint criminal enterprise should take into account all the circumstances and contingencies contemplated as within the scope of the common design when the enterprise was embarked upon or whether the determination is confined to the discrete circumstances of each contingency that arises leading to the commission of the incidental offence.